IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 27, 2008 Session

STATE OF TENNESSEE v. MITCHELL EADS

Direct Appeal from the Criminal Court for Claiborne County
No. 12016 E. Shayne Sexton, Judge

No. E2006-02791-CCA-R3-CD - Filed July 14, 2008

The defendant, Mitchell Eads, was convicted by a Claiborne County jury of aggravated burglary, a Class C felony, and theft of property under $500, a Class A misdemeanor. Pursuant to agreement, he was sentenced by the trial court as a Range I, standard offender to concurrent terms of three years at 30% for the aggravated burglary conviction and eleven months, twenty-nine days at 75% for the theft conviction, to be served consecutively to his sentences in three previous cases. The defendant raises four issues on appeal: (1) whether the evidence was sufficient to sustain his convictions; (2) whether the trial court committed reversible error by not instructing the jury on criminal trespass and aggravated criminal trespass as lesser-included offenses of aggravated burglary; (3) whether the doctrine of collateral estoppel should have barred the State's introduction of evidence relating to the defendant's constructive possession of a truck in light of his acquittal of theft of the truck in an earlier case; and (4) whether the State committed prosecutorial misconduct by introducing and referring to evidence of unindicted offenses. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Wesley D. Stone, Franklin, Tennessee, for the appellant, Mitchell Eads.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; William Paul Phillips, District Attorney General; and Jared Effler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case arises out of a burglary and theft perpetrated at a Kentucky couple's vacation cabin in Claiborne County. On January 31, 2002, one of the couple's neighbors discovered the defendant asleep on the cabin's porch and a pickup truck loaded with items from the cabin hidden in the woods 100 yards beyond the residence. The defendant was subsequently charged in a nine-count indictment with various burglary, theft, and vandalism offenses in connection with the incident. On August 13, 2003, having apparently succeeded in a motion for severance of offenses, the defendant proceeded to jury trial on one count of aggravated burglary, one count of theft over $1000, and one count of vandalism under $500.[1]

The State's first witness was Dr. Kenneth Smith, a retired physician from Middlesboro, Kentucky, who testified that his wife and sister-in-law owned a cabin off Needham Hollow Road in Claiborne County, Tennessee. Their cabin was located approximately forty yards from the cabin of Colin and Shirley Halcomb, and the two families shared a common driveway that was kept closed with a padlocked cable. He was unlocking the padlock during a routine visit on January 31, 2002, when he noticed tire tracks coming from a TVA logging road through some bushes to the driveway, bypassing the cable, and continuing through the Halcombs' yard to their cabin. Investigating further, he saw that the padlock was still in place on the front door of the Halcombs' cabin but that a side door to a screened porch was unlocked. He said he opened the door, stepped inside, and saw a man asleep on a cot at the far end of the screened porch.

After exiting the porch, he followed the tire tracks up a small hill on an abandoned, overgrown farm road until he came to a red pickup truck parked in the woods approximately 100 yards beyond the cabin. Dr. Smith testified that he did not believe either the man or the truck to be legitimately associated with the Halcomb cabin and, in fact, "was sure that the person who had driven the truck there had done it for the purpose of hiding the vehicle." He said he next went to the Claiborne County Dock to telephone the sheriff's department.

Sergeant Michael Joe Gray of the Claiborne County Sheriff's Department testified that the defendant, who was still asleep on the cot when he arrived at the Halcomb cabin, told him as he was being placed under arrest that the truck was in the woods and inquired how Sergeant Gray had known where to find him. He stated that tire tracks outside the cabin led to a red Ford F-150 pickup truck containing various items from the cabin. He said that he found damage to the screened porch door and to the door to the cabin's interior, mud on the floor, and unmade beds inside the cabin.

Colin Halcomb testified that his cabin was in good shape, with beds made and doors locked, when he left after winterizing it at the end of November 2001 but was in "[v]ery bad" condition when he returned in February 2002 after learning about the break-in. Among other things, the cabin was very muddy, beds were "messed up," a throw rug was "wadded up," an ashtray had been moved from the front porch into a bedroom, a blanket had been moved from a bedroom closet to the couch on the front porch, a screen had been cut, there were pry marks at the door leading to the cabin interior, and numerous items were missing.

[1]Following the trial on this matter, the State nolle prosequied the remaining counts of the indictment.

Halcomb identified a property receipt listing some of the missing items that had been recovered and returned to him, including a wet vacuum, a dry vacuum, a coffeemaker, a pair of skis, five life jackets, a battery charger, a marine battery, a floating light, and a 100-foot extension cord. He estimated that the total value of these recovered items was approximately $1000 and that the total value of missing fishing equipment, which was never recovered, was approximately $500. He said that all of the food that he and his wife had stored in the cabin was missing as well. Finally, he stated that he gave no one permission to enter or remove property from the cabin. On cross-examination, he testified that his estimate of the property's value was based on its original purchase price and that he believed it would cost substantially more to replace the items at current prices.

Shirley Halcomb testified that their cabin electric bill covering the month of January 2002 increased threefold, to more than $30.00, from their usual minimum bill of $10.65 per month. She said that the stolen items had been located throughout the cabin. On cross-examination, she acknowledged that she and her husband had not yet repaired the cut screen door.

Jim McMurray, owner of the Ford pickup truck found hidden behind the cabin, testified that he did not load the items from the Halcomb cabin into the truck, park the truck in that location, or give anyone else his consent to do so. On cross-examination, he acknowledged that the defendant had been acquitted of theft of the truck in an earlier trial.

The defendant elected not to testify and rested his case without presenting any proof. Following deliberations, the jury convicted him of aggravated burglary and theft of property under $500 but acquitted him of the vandalism charge.

ANALYSIS

I. Sufficiency of the Evidence

As his first issue, the defendant challenges the sufficiency of the evidence in support of his aggravated burglary and theft convictions. He argues, *inter alia,* that the State's circumstantial evidence was insufficient to prove beyond a reasonable doubt that he entered the main portion of the cabin or removed and placed the items in the pickup truck. He concedes that he entered the porch but contends that his purpose was to take a nap and that the State failed to prove beyond a reasonable doubt his intent to commit a theft. The State argues that the evidence, viewed in the light most favorable to the prosecution, was sufficient to sustain the defendant's convictions for aggravated burglary and theft under $500. We agree with the State.

When the sufficiency of the convicting evidence is challenged, we must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). The same standard applies whether the finding of guilt is predicated upon direct

evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

For the theft under $500 conviction, the State had to prove beyond a reasonable doubt that the defendant, with the intent to deprive the owner of property, knowingly obtained or exercised control over property without the owner's effective consent and that the value of the property was $500 or less. Tenn. Code Ann. §§ 39-14-103, -105(1) (2006). For the aggravated burglary conviction, the State had to prove beyond a reasonable doubt that the defendant entered a habitation without the effective consent of the owner and with the intent to commit a theft. Id. § 39-14-402(a)(1), -403(a). A habitation is defined, as "any structure . . . which is designed or adapted for the overnight accommodation of persons[.]" Id. § 39-14-401(1)(A).

We conclude that the evidence, viewed in the light most favorable to the State, was sufficient to sustain both convictions. The State presented proof that the defendant was discovered asleep on the porch of the Halcomb cabin, which had been broken into and from which a number of items had been removed and placed in a pickup truck that was hidden from view. When asked where the truck was, the defendant replied that it was "up in the woods" and inquired as to how the arresting officer had known where to find him. The cabin was dirty, beds were unmade, food stored in the cabin was missing, and the electric bill for the month of January was three times higher than a typical month when no one was occupying the cabin. From this evidence, a rational jury could have reasonably concluded that the defendant broke into the Halcomb cabin with the intent to commit a theft and that he stole the items that were missing from the cabin.

II. Jury Instructions on Lesser-Included Offenses

The defendant next contends that the trial court committed reversible error by not instructing the jury on criminal trespass and aggravated criminal trespass as lesser-included offenses of aggravated burglary. The State responds that the defendant has waived plenary review of the issue by his failure to submit his request for the instructions in writing. The State further argues that the trial court's denial of the defendant's oral request for the instructions does not rise to the level of plain error because the law was unsettled at the time of trial as to whether aggravated criminal trespass was a lesser-included offense of aggravated burglary. In a reply brief, the defendant points out that he included the issue in his motion for new trial and argues that it would be elevating form over substance for this court to limit the issue to plain error review. He further argues that he is entitled to relief even under the more stringent standards of plain error review because our supreme court's decision in State v. Terry, 118 S.W.3d 355 (Tenn. 2003), which held that aggravated criminal

trespass is a lesser-included offense of aggravated burglary, was decided prior to the hearing on his motion for a new trial.

As an initial matter, we agree with the State that the defendant has waived plenary review of the issue by his failure to place his requests for jury instructions in writing. Tennessee Code Annotated section 40-18-110, effective for all cases tried on or after January 1, 2002, provides in pertinent part:

> (b) In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any lesser included offense charge.
>
> (c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, the lesser included offense instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense *may not be presented as a ground for relief either in a motion for a new trial or on appeal.*

Tenn. Code Ann. § 40-18-110(b)-(c) (2006) (emphasis added). We, therefore, review this issue under the doctrine of plain error. See State v. Page, 184 S.W.3d 223, 230-31 (Tenn. 2006).

The doctrine of plain error provides that where necessary to do substantial justice, an appellate court may take notice of a "plain error" not raised at trial if it affected a substantial right of the defendant. Tenn. R. Crim. P. 52(b). In order for us to find plain error, "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'" State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)).

As the State points out, at the time of the defendant's trial, the law was unsettled as to whether aggravated criminal trespass was a lesser-included offense of aggravated burglary. Our supreme court noted this split in the lower courts' interpretation of the law in its analysis in Terry:

> Although both parties agree that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary pursuant to part (b) of [the Burns] test, we provide the following analysis because this Court has not yet decided the matter and because there are conflicting intermediate court decisions. See State v. Moten, No. W2001-01922-CCA-R3-CD, 2002 WL 31730891, at *3 (Tenn. Crim. App. Nov. 22, 2002) (finding that "criminal trespass is not a lesser-included offense of aggravated burglary"); State v. Terry, No. W2001-03027-CCA-RM-CD, 2002 WL 31259488, at *6 (Tenn. Crim. App. Aug. 27, 2002) (holding that aggravated criminal trespass is not a lesser-included offense of aggravated burglary and thus,

> that attempted aggravated criminal trespass is not a lesser-included offense of attempted aggravated burglary); State v. Johnson, No. E2000-00009-CCA-R3-CD, 2001 WL 81696, at *8 (Tenn. Crim. App. Jan. 31, 2001) (holding "[c]riminal trespass, aggravated or otherwise, is not a lesser-included offense of burglary, aggravated or otherwise"); State v. Townes, 56 S.W.3d 30, 39 (Tenn. Crim. App. 2000) (finding that "employing a statutory approach . . ., criminal trespass cannot be a lesser-included offense of burglary"; cf. State v. White, No. E2001-02429-CCA-R3-CD, 2002 WL 1732338, at *4 (Tenn. Crim. App. Apr. 12, 2002) (holding that criminal trespass is a lesser-included offense of aggravated burglary); State v. Redd, No. W2000-01620-CCA-R3-CD, 2001 WL 912718, at *5 (Tenn. Crim. App. Aug. 9, 2001) (finding that "criminal trespass [is a] lesser-included offense[ ] of burglary").

118 S.W.3d at 358. The court then went on to conclude that aggravated criminal trespass is a lesser-included offense of aggravated burglary and that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary. Id. at 359. However, because the law on aggravated criminal trespass as a lesser-included offense of aggravated burglary was still unsettled during the relevant time period, no clear and unequivocal rule of law was breached in the instant case. We conclude, therefore, that the trial court's refusal to issue the requested lesser-included jury instructions does not rise to the level of plain error.

III. Collateral Estoppel

As his third issue, the defendant contends that the doctrine of collateral estoppel should have precluded the State from introducing evidence relating to his constructive possession of Jim McMurray's pickup truck because he was acquitted of theft of the same truck in an earlier trial. In essence, he argues that because the State relied on his constructive possession of the truck in the earlier prosecution, it should have been barred from introducing any evidence of his constructive possession of the truck or the items found in it in the current trial. We respectfully disagree.

In Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970), the United States Supreme Court recognized that the doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy," id. at 445, 90 S. Ct. at 1195, and "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443, 90 S. Ct. at 1194. The burden is on the defendant to demonstrate that the issue he seeks to foreclose from consideration was necessarily decided in the first trial. Dowling v. United States, 493 U.S. 342, 350, 110 S. Ct. 668, 673 (1990); see also State v. Vickers, 985 S.W.2d 1, 7-8 (Tenn. Crim. App. 1997) ("[T]he burden is on the appellant to prove by *clear and convincing evidence* that, in the earlier trial, the court or a jury necessarily decided the issue of fact which is an element at issue in the present indictment.") (emphasis in original) (citations omitted). To determine whether the defendant has met this burden, a court must examine the record of the first trial, "taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe, 397 U. S. at 444, 90 S. Ct. at 1194 (footnote and internal quotation marks omitted).

The defendant was tried in case number 11969 for, *inter alia*, the burglary of "Annie's Auto Sales," a used car lot business, and the theft from the business of various items, including miscellaneous tools and engine parts that had been stored in the buildings and Jim McMurray's Ford pickup truck which had been parked in the outside lot. State v. Mitchell Eads, No. E2006-02290-CCA-R3-CD, 2008 WL 2557367 (Tenn. Crim. App. June 26, 2008). Among other evidence, the State presented the statement the defendant gave to police in which, although attempting to minimize his involvement, he essentially admitted his participation with a friend, John Thomas, in the burglary of the business and theft of items from the buildings. Id. at *7. In the statement, the defendant claimed that Thomas took the truck in order to transport the items stolen from the business, some of which were left at the defendant's girlfriend's house. The defendant claimed that he tried to persuade Thomas to park the truck behind the courthouse where it could be found, but Thomas left it parked overnight at the defendant's girlfriend's residence. The defendant told the interviewing officer he insisted that Thomas remove the truck the next day and said he thought he might know where Thomas had hidden the truck. Id.

The State also presented evidence about the defendant's having been discovered asleep on the porch of the Halcomb cabin, having been asked by the arresting officers where the truck was located, and having replied that it was "up in the woods." Id. at *6-7. The defendant, on the other hand, presented two witnesses, his girlfriend and her sister, who both testified that Thomas was the only person they ever saw driving or doing anything with the truck. Id. at *8. Following deliberations, the jury convicted the defendant of the burglary of the business and the theft of the tools and other miscellaneous items, but acquitted him of theft of the truck. Id.

To convict the defendant of theft of the truck, the State had to prove beyond a reasonable doubt that he, with the intent to deprive the owner of property, knowingly obtained or exercised control over the property of another without the owner's effective consent. See Tenn. Code Ann. § 39-14-103. Thus, the defendant's acquittal on the elements of theft of the truck at the first trial did not necessarily preclude a finding of his constructive possession of the truck or of the items in the truck at the second trial. We conclude, therefore, that the defendant is not entitled to relief on the basis of this claim.

IV. Prosecutorial Misconduct

As his final issue, the defendant contends that the State committed prosecutorial misconduct by introducing during its case-in-chief and referring in closing to evidence of his unindicted crimes, specifically, his alleged theft of electrical services and food from the cabin. The State argues, *inter alia*, that the evidence was relevant to show that someone was in the cabin during the time period the defendant was found asleep on the porch and that any error was cured by the trial court's repeated instructions to the jury that the defendant was not on trial for stealing food and electricity. We agree with the State.

In reviewing allegations of prosecutorial misconduct, we consider "whether such conduct could have affected the verdict to the prejudice of the defendant." State v. Smith, 803 S.W.2d 709, 710 (Tenn. Crim. App. 1990). In determining whether this occurred, we consider the following factors: (1) the conduct viewed in light of the circumstances and facts in the case; (2) any curative

measures taken by the trial court and the prosecution; (3) the prosecutor's intent in making the improper statements; (4) the cumulative effect of the prosecutor's statements and other errors in the record; and (5) the relative strength and weakness of the case. State v. Middlebrooks, 995 S.W.2d 550, 560 (Tenn. 1999).

The behavior of which the defendant complains occurred at three points during trial. During its case-in-chief, the prosecutor elicited the testimony from Mr. Halcomb that food he had stored in the cabin was missing after the break-in. Defense counsel objected, and the prosecutor explained that he had elicited the testimony not to show that the defendant stole the food but that he had been in the cabin. The trial court then issued the following instruction to the jury:

> Ladies and gentleman, the Court is going to give you a limiting instruction. [The defendant] is not on trial for the theft of food. Items that are listed in the indictment are clear. You have a copy of that. And any item outside that the State may refer to to another witness is not something that [the defendant] is held accountable for. You understand that? Does everyone understand that he's not being charged with that?
>
> All right.

Defense counsel again objected when the prosecutor began to question Mrs. Halcomb about her usual electric bill at the cabin. When asked for the relevance of such testimony, the prosecutor explained that it "goes to show that someone was inside the cabin during the time period which we are alleging." The trial court overruled the objection and later gave an additional limiting instruction to the jury.

Finally, during rebuttal argument, the prosecutor made the following statement to the jury:

> [The defendant's] intent was to take up residence in their house and, in doing that, he was in and out, in and out, in and out, and by taking up residence, he had the intent to use their electricity, and he had the intent to eat their food, and that is theft. The electricity was not –

Defense counsel objected and the trial court sustained the objection, instructing the jury to disregard the State's last remarks. After the jury had retired to deliberate, defense counsel moved for a mistrial, arguing that the trial court's curative instructions were insufficient to overcome the prejudice to the defendant caused by the comments. Finding no prejudice, the trial court denied the motion.

We find no error by the trial court in this mater. The complained-of testimony and comments occupy only a small portion of the entire transcript, the prosecutor adequately explained that his purpose in introducing the evidence was to refute the defendant's claim that he had not entered the cabin and had been on the porch only that one day to take a nap, the trial court issued instructions to the jury sufficient to cure any prejudice, and ample proof was presented to sustain the defendant's convictions. We conclude, therefore, that the defendant is not entitled to relief on the basis of this claim.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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ALAN E. GLENN, JUDGE